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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 SUSAN HOWELL,

10 Plaintiff,

11 v.

12 ENERGY NORTHWEST,

13 Defendant.
14

NO. 2:12-CV-05153-SAB

**ORDER DENYING
DEFENDANT'S MOTIONS FOR
SUMMARY JUDGMENT**

15 Before the Court are Defendant's Motion for Partial Summary Judgment on
16 Plaintiff's Gender Disparate Treatment and Retaliation Claims, ECF No. 67, and
17 Defendant's Motion for Partial Summary Judgment on Plaintiff's Disability
18 Discrimination Claims, ECF No. 85. The motions were heard without oral
19 argument. Plaintiff is represented by Anne-Marie Sargent. Defendant is
20 represented by Keller Allen, Robert Dutton, and Kathleen Galioto.

21 Plaintiff is a former employee of Energy Northwest. She brought suit under
22 Title VII and the Washington Law Against Discrimination, alleging gender
23 discrimination, harassment/hostile work environment, retaliation, disability
24 discrimination and disparate impact discrimination. ECF No. 22. Previously, the
25 Court denied Defendant's Motion for Partial Summary Judgment on Plaintiff's
26 harassment/hostile work environment claim and Plaintiff dismissed her disparate
27 impact claim. ECF No. 83.

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**ORDER DENYING DEFENDANT'S MOTIONS FOR SUMMARY
JUDGMENT ~ 1**

1 Defendant now moves for summary judgment on Plaintiff's gender
2 discrimination, retaliation, and disability discrimination claims.

3 ANALYSIS

4 1. Gender Discrimination Claim

5 Disparate treatment occurs "where an employer has treated a particular
6 person less favorably than others because of a protected trait." *Wood v. City of San*
7 *Diego*, 678 F.3d 1075, 1081 (9th Cir. 2012). There are two ways a plaintiff can
8 survive a summary judgment motion in an employment discrimination case: (1)
9 direct or circumstantial evidence of discriminatory motive or intent; or (2) meeting
10 the three-step burden-shifting scheme established in *McDonnell Douglas Corp. v.*
11 *Green*, 411 U.S. 792 (1973). *Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d
12 1027, 1037 (9th Cir. 2005) ("In responding to a summary judgment motion in a
13 Title VII disparate treatment case, a plaintiff may produce direct or circumstantial
14 evidence demonstrating that a discriminatory reason more likely than not
15 motivated the defendant's decision, or alternatively may establish a prima facie
16 case under the burden-shifting framework set forth in *McDonnell Douglas*.").

17 A plaintiff may defeat summary judgment by offering direct or
18 circumstantial evidence "that a discriminatory reason more likely motivated the
19 employer" or "that the employer's proffered explanation is 'unworthy of credence'
20 because it is internally inconsistent or otherwise not believable." *Anthoine v.*
21 *North Central Counties Consortium*, 605 F.3d 740, 753 (9th Cir. 2010) (citing
22 *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1127 (9th Cir. 2000).
23 "These two approaches are not exclusive; a combination of the two kinds of
24 evidence may in some cases serve to establish pretext so as to make summary
25 judgment improper." *Id.*

26 Construing the facts in the light most favorable to Plaintiff, the Court finds
27 there is sufficient evidence in the record for a reasonable jury to find that
28 Plaintiff's gender was a motivating factor in Defendant's decision (a) to require

1 her to take the second test on the same day; (b) to invalidate the third test; (c) to
2 not give her time to recuperate before testing again; and (d) to terminate her. As
3 such, summary judgment is not appropriate on Plaintiff's gender discrimination
4 claims.

5 **2. Retaliation Claim**

6 Similar to Plaintiff's hostile workplace claim, Plaintiff's retaliation claim is
7 like, or reasonably related to, the allegations contained in the EEOC charge and an
8 EEOC investigation of retaliation was likely to grow out of the charge. *See B.K.B.*
9 *v. Maui Police Dep't*, 276 F.3d 1091, 1100 (9th Cir. 2002). As such, the Court has
10 jurisdiction over Plaintiff's Title VII retaliation claim.

11 To establish a prima facie case of retaliation, a plaintiff must show that (1)
12 she engaged in statutorily protected activity; (2) she suffered an adverse
13 employment action; and (3) there was a causal link between her activity and the
14 other person's adverse action. *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061,
15 1074 (9th Cir. 2003); *Currier v. Northland Services, Inc.*, __ Wash.App. __, 2014
16 WL 3842954 *3 (Aug. 4, 2014). To provide a causal link between the protected
17 activity, *i.e.* complaints of gender discrimination, and her termination, Plaintiff
18 must provide evidence that her complaints were a "substantial factor" motivating
19 Defendant's decision. *Currier*, 2014 WL 3842954 at *4. As the Washington courts
20 explain, "retaliation need not be the main reason behind the discharge decision but
21 instead need only be the reason which 'tips the scales' toward termination." *Id.*

22 Here, Plaintiff has met her burden of presenting evidence that Defendant's
23 explanations for her termination are pretext for discriminatory motive. *See Bell v.*
24 *Clackamas County*, 341 F.3d 858, 865 (9th Cir. 2003) ("Temporal proximity
25 between protected activity and an adverse employment action can by itself
26 constitute sufficient circumstantial evidence of retaliation in some cases.")
27 Consequently, there is sufficient evidence in the record for a reasonable jury to
28 find that Plaintiff's complaints about gender discrimination were a motivating or

1 substantial factor in the decision to terminate her, and summary judgment is not
2 appropriate on Plaintiff's retaliation claims.

3 **3. Failure to Accommodate Claim**

4 In her Amended Complaint, Plaintiff asserted a claim under the Washington
5 Law Against Discrimination, Wash. Rev. Code § 49.60.180, for failing to
6 accommodate Plaintiff for her disability, failing to participate in the interactive
7 process to accommodate her disability, and for terminating her in part on the basis
8 of her disability or perceived disability.¹ With respect to reasonable
9 accommodation, Plaintiff contends that the only accommodation she needed was
10 additional time to recover from her knee injury before re-taking the tactical
11 qualification test.

12 To establish a prima facie case of failure to reasonably accommodate a
13 disability, a plaintiff must show that (1) the employee had a sensory, mental, or
14 physical abnormality that sufficiently limited her ability to perform the job; (2) the
15 employee was qualified to perform the essential functions of the job in question;
16 (3) the employee gave the employer notice of the abnormality and its accompany
17 substantial limitations; and (4) upon notice, the employer failed to affirmatively
18 adopt measures that were available to the employer and medically necessary to
19 accommodate the abnormality. *Davis v. Microsoft Corp.*, 149 Wash.2d 521, 532
20 (2003). An employer's duty to reasonably accommodate an employee's disability
21 does not rise until the employer is aware of the employee's disability and physical
22 limitations. *Anica v. Wal-Mart Stores*, 120 Wash.App. 481, 489-90 (2004). The
23 employee bears the burden of giving the employer notice of her disability. *Id.*

24 An employer must reasonably accommodate a disabled employee unless the
25 accommodation would pose an undue hardship. *Frisino v. Seattle Sch. Dist. No.1*,

27 ¹ Plaintiff concedes that her claim alleging she was terminated due to her disability
28 may be dismissed. ECF No. 93 at 3 n.2.

1 160 Wash.App. 765, 777 (2011). A reasonable accommodation must allow the
2 employee to work in the environment and perform the essential functions of her
3 job without substantially limiting symptoms. *Id.* To meet its burden, the employer
4 must affirmatively take steps to help the disabled employee continue working at
5 the existing position or attempt to find a position compatible with the limitations.
6 *Id.* On the other hand, an employer is not required to reassign an employee to a
7 position that is already occupied, create a new position, or eliminate or reassign
8 essential job functions. *Id.*

9 Here, there are genuine issues of material fact surrounding Plaintiff's injury,
10 whether Defendant was given notice, and whether it was unreasonable for
11 Defendant to deny Plaintiff time to recuperate from her injury before she was
12 required to take the tactical qualification test. As such, summary judgment is not
13 appropriate on Plaintiff's disability discrimination claims.

14 Accordingly, **IT IS HEREBY ORDERED:**

15 1. Defendant's Motion for Partial Summary Judgment on Plaintiff's Gender
16 Disparate Treatment and Retaliation Claims, ECF No. 67, is **DENIED**.

17 2. Defendant's Motion for Partial Summary Judgment on Plaintiff's
18 Disability Discrimination Claims, ECF No. 85, is **DENIED**.

19 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
20 file this Order and provide copies to counsel.

21 **DATED** this 27th day of August, 2014.



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A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

27 Stanley A. Bastian
28 United States District Judge